No. 74-1397

SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

SAMUEL RIZZO DECAVALCANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court erred in denying his motion to withdraw his guilty plea and in refusing to conduct an evidentiary hearing as to the existence and validity of certain court-authorized wire interceptions.

1. On December 15, 1969, an indictment returned in the United States District Court for the District of New Jersey charged petitioner and 52 others with conspiracy to violate 18 U.S.C. 1952 by promoting and managing a gambling enterprise prohibited by state law and by traveling in interstate commerce and using the telephone to do so, in violation of 18 U.S.C. 371.

At that time petitioner was already under indictment in the same court on three counts of conspiracy and extortion. On September 15, 1970, trial commenced on the extortion case, resulting in conviction of petitioner and

his co-defendants in that case; on October 2, 1970, he was sentenced to consecutive terms of five years' imprisonment on each count. Petitioner's appeal from this conviction was argued on December 10, 1970.

On January 2, 1971, while that appeal was still pending, petitioner pled not guilty to the instant gambling conspiracy indictment, and trial was set for February 1971. On January 15, 1971, at petitioner's request and following a hearing, the court permitted him to withdraw his not guilty plea and to plead guilty. The prosecution had advised petitioner's counsel that it would recommend that any sentence pursuant to the gambling charges run concurrently with the sentences previously imposed on the extortion convictions, and that the government would not oppose a suspended sentence. See *United States* v. *DeCavalcante*, 449 F.2d 139, 140 (C.A. 3), certiorari denied, 404 U.S. 1039.

On March 10, 1971, the court of appeals reversed petitioner's conviction in the extortion case, directing an acquittal on two counts and requiring a new trial on the third. *United States* v. *DeCavalcante*, 440 F.2d 1264 (C.A. 3). Two days later petitioner moved for leave to withdraw his guilty plea in the gambling case, but, after a hearing, the court denied the motion. Petitioner was subsequently sentenced to a term of five years' imprisonment and a fine of $10,000. The court of appeals affirmed the denial of leave to withdraw the guilty plea, based upon the trial court's finding that the plea "was entered voluntarily and knowingly, without any misunderstanding, misrepresentation or improper inducement," and that withdrawal of the plea would present a "significant potential prejudice to the prosecution * * *." *United States* v. *DeCavalcante*, *supra*, 449 F.2d at 141.

2. Following this Court's decision in *United States* v. *Giordano*, 416 U.S. 505, petitioner moved in the district court to vacate his plea of guilty under Rule 32(d), Fed. R. Crim. P., and to conduct a hearing pursuant to the provisions of 18 U.S.C. 2518(10), concerning intercepted wire communications.[1] Petitioner claimed that a hearing was justified to determine whether his indictment on the gambling charges was the result of evidence obtained by a wire interception and, if so, whether such electronic surveillance had been properly authorized as required by 18 U.S.C. 2516(1). Petitioner further argued that if such wiretaps were improperly authorized, and the evidence obtained thus subject to suppression under *Giordano*, he should be entitled to withdraw his plea of guilty under Rule 32(d).

In denying petitioner's motion, the district court assumed, *arguendo*, that a "hearing would establish that the evidence against Mr. DeCavalcante in this case was obtained in violation of 18 U.S.C., Section 2518 * * *" (Pet. App. 16a), but it concluded that petitioner's guilty

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[1]Section 2518(10) provides in pertinent part:

> (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom * * * [on specified grounds].
>
> * * * * *
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

Both the district court and the court of appeals properly noted that petitioner's motion for a hearing under 18 U.S.C. 2518(10) was untimely under the provisions of that statute (Pet. App. 16a-17a, 21a-22a).

Rule 32(d) provides in pertinent part:

> [T]o correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

plea foreclosed any inquiry into the legality of the means by which the evidence was obtained (*id.* at 15a-19a).[2] The court of appeals affirmed (Pet. App. 21a-22a).

3. The courts below correctly ruled that petitioner was not entitled to a hearing to explore the legality of the government's means of obtaining evidence that led to petitioner's indictment and subsequent guilty plea. This Court recently reiterated the governing principle:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. [*Tollett* v. *Henderson*, 411 U.S. 258, 267.]

Contrary to petitioner's assertion (Pet. 5), the fact that he entered his plea of guilty prior to this Court's decision in *United States* v. *Giordano*, *supra*, does not alter this principle. See *Tollett* v. *Henderson*, *supra*, 411 U.S. at 267; *Brady* v. *United States*, 397 U.S. 742, 757.[3]

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[2]Although petitioner asserts a "strong possibility" that his indictment was based on evidence derived from an invalid wiretap authorization (Pet. 3), the record here does not even establish that any communications were intercepted as to which petitioner has standing to complain.

[3]Petitioner raises "[n]o question" about the competency of counsel representing him in connection with the guilty plea with respect to the failure to challenge the validity of any pertinent interceptions (Pet. App. 7a).

Nor does the possibility that petitioner might be able to demonstrate that evidence against him was illegally obtained demonstrate such "manifest injustice" that it was an abuse of discretion for the district court to decline to vacate his guilty plea under the Rule 32(d). Even if petitioner could make such a showing, that would not impugn the truth or reliability of his plea. See *Tollett* v. *Henderson*, *supra*, 411 U.S. at 263-264.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.